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Supreme Court, U.S.
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No. 03 810

IN THE

SUPREME COURT OF THE UNITED STATES

IN RE:

DONALD O. PINKSTON,

Petitioner.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF LOUISIANA

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

[FILED SEP 5 2003]

SUPREME COURT OF LOUISIANA

NO. 02-B-3251

c/w

NO. 02-B-3252

IN RE: DONALD O. PINKSTON

ON APPLICATION FOR REHEARING

PER CURIAM

Respondent, Donald O. Pinkston, seeks rehearing from the judgment of this court permanently disbarring him from the practice of law. Essentially, respondent claims that he was denied procedural due process because the Office of Disciplinary Counsel did not give him notice, either in its formal charges or written briefs, that permanent disbarment could be imposed in his case.[1]

The essence of procedural due process is that "notice should be given to the attorney of the charges made and opportunity afforded him for explanation and defense." *In re: Ruffalo*, 390 U.S. 544, 550 (1968) (quoting *Ran-*

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[1] Respondent also argues he was deprived of substantive due process and application of the permanent disbarment rules to his conduct would violate the prohibition against ex post facto laws. Nearly identical arguments were discussed and rejected in this court's recent opinion in *In re: Laudumiey and Mann*, 03-0234 (La. 6/27/03), ___So.2d ___.

dall v. Brigham, 7 Wall. 523 (1868)). It is undisputed that respondent had full notice of the charges against him. He participated in the formal hearing before the hearing committee and presented mitigating evidence. He was clearly aware that the charges against him were serious, as demonstrated by the fact that both the hearing committee and disciplinary board recommended disbarment.

Respondent filed an objection in this court to the recommendation of disbarment, filed a written brief and participated in oral argument. The thrust of respondent's argument in this court was that his misconduct was not serious enough to warrant disbarment. Clearly, respondent's position that he should not be disbarred necessarily encompassed the argument that he should not be permanently disbarred. As this court has recognized, permanent disbarment does not represent a new sanction which did not previously exist; rather, it is simply a procedural change to the rule which recognizes a power the court has always possessed. *See In re: Laudumiey and Mann,* 03-0234 (La. 6/27/03), at p. 10, ___ So.2d ___ ("[t]hus, it is clear the amendments to Supreme Court Rule XIX, § 10(A) and § 24(A) do not represent a substantive change to the bar disciplinary rules, nor do they result in the adoption of a new sanction which did not previously exist. Rather, these amendments simply represent a procedural change to Supreme Court Rule XIX in order to recognize a power this court has always possessed"). Therefore, we find respondent received adequate procedural due process protection.

Accordingly, the application for rehearing is denied.

APPENDIX B

[Filed JUN 2 2003]

IN THE SUPREME COURT
OF THE STATE OF LOUISIANA

NO. 02-B-3251
c/w
NO. 02-B-3252

IN RE: DONALD O. PINKSTON,
ATTORNEY DISCIPLINARY PROCEEDINGS

DONALD O. PINKSTON'S
PETITION FOR REHEARING

COMES NOW Donald O. Pinkston, respondent in the above entitled and numbered proceedings who, pursuant to Rule IX of the Supreme Court Rules, respectfully petitions this Honorable Court for a hearing in this matter. As grounds for this hearing, respondent shows that the May 20, 2003 *per curiam* opinion of this Court, which permanently disbarred him from the practice of law in the State of Louisiana, violates respondent's right to procedural due process of law under Article I, §2 of the Louisiana Constitution (1974) and the Fourteenth Amendment to the United States Constitution; it violates respondent's right to substantive due process of law under Article I, §2 of the Louisiana Constitution (1974)

and the Fourteenth Amendment to the United States Constitution; it violates respondent's right to substantive due process of law under Article I, §2 of the Louisiana Constitution (1974) and the Fourteenth Amendment to the United States Constitution; and it violates Article I, §23 of the Louisiana Constitution (1974) and Article I, Section 9, cl. 3 of the United States Constitution, in that it constitutes an *ex post facto* application of the laws of the State of Louisiana.[1] In further support of this petition for rehearing, respondent shows:

1. On April 21, 1999, the Office of Disciplinary Counsel filed formal charges in proceedings #99-DB-029, described as the "Small matter" in the Court's opinion. As can be seen from the face of those pleadings, and as is set forth in this Court's opinion, all of the respondent's conduct in the Small matter occurred prior to December 31, 1998.

2. On June 12, 2000,[2] the Office of Disciplinary Counsel filed formal charges in proceedings #00-DB-073, described as the "McDonald, Isaac, Alston, Jones and Motton matters" in the Court's opinion. As can be seen from the face of those pleadings, and as is set forth in this Court's opinion, all of respondent's conduct in the McDonald, Isaac, Alston, Jones and Motton matters occurred prior to December 31, 1999.

3. Because hearings were conducted in both proceedings,[3] pre-and post-hearing memoranda were submitted

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[1]The sanction of permanent disbarment was added to Rule XIX, Section 10, by order of this Court dated July 19, 2001, effective August 1, 2001.

[2]The Court's opinion of May 20, 2003, erroneously gives the filing date for this second set of charges as May, 2001. *See Court's Opinion*, p. 7.

[3]The two proceedings have never been formally consolidated, although the Disciplinary Board issued only one opinion, addressing both proceedings.

by the parties in each instance. Significantly, in the pre-hearing memorandum submitted by the Office of Disciplinary Counsel in proceedings #99-DB-029, counsel stated that the appropriate sanction was "disbarment." The sanction of permanent disbarment was neither raised, nor sought.

In the post-hearing memorandum submitted by the Office of Disciplinary Counsel on January 22nd, 2001, in the same proceedings, counsel stated: "In keeping with the stipulation of counsel for Pinkston, disbarment is the only appropriate remedy."[4] Again, the sanction of permanent disbarment was not raised, or sought.

4. In the pre-hearing memorandum submitted by the Office of Disciplinary Counsel on August 29, 2000, in proceedings #00-DB-073, counsel stated: "Disciplinary Counsel suggests that the appropriate sanction is a lengthy suspension."

In the post-hearing memorandum submitted by the Office of Disciplinary Counsel on November 30, 2000, in these same proceedings, counsel stated: "Disciplinary Counsel suggests that Respondent should be suspended for a lengthy period of time. Considering the multiple cases of misconduct and all the aggravating factors, a lengthy suspension is appropriate to protect the public."

5. On March 7, 20001, Hearing Committee No. #24 issued its "Findings and Recommendation" in proceedings #00-DB-073, in which the Committee stated: "It is the Committee's recommendation that Respondent be

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[4]In his pre-hearing memorandum, counsel for Pinkston had stated as follows: "The appropriate sanction for the charges brought by the Office of Disciplinary Counsel is disbarment, if the charges are proven by clear and convincing evidence. *See In Re: Ronald A. Welcker*, 753 So.2d 177 (La. 2000)."

suspended from the practice of law for thirty (30) months and be required to file a petition for reinstatement."

6. On May 8, 2001, Hearing Committee No. #24 issued its "Findings and Recommendation" in proceedings #99-DB-029, in which the Committee stated: "It is the Committee's recommendation that Respondent be disbarred and that he be assessed all costs of these proceedings." Again, the sanction of permanent disbarment was not mentioned.

7. Thereafter, arguments were held before the Louisiana Attorney Disciplinary Board on March 28, 2002. Although the transcript of those arguments has not been made part of the record of these proceedings, undersigned counsel avers that the sanction of permanent disbarment was neither sought, nor even mentioned by the Office of Disciplinary Counsel.

8. On December 30, 2002 the Disciplinary Board recommended that respondent be disbarred. Significantly, at no place in its recommendation does the Disciplinary Board recommend the sanction of permanent disbarment, or even suggest that it was available as a sanction.

9. On April 4, 2003, the Office of Disciplinary Counsel filed its brief in the instant proceeding. With regard to proceedings 99-DB-029, Disciplinary Counsel wrote: "It is respectfully submitted that both the hearing committee and the Disciplinary Board were correct and that the respondent be disbarred from the practice of law and cast with all costs associated with these proceedings."

(ODC Brief, p.13).[5] With regard to proceedings 00-DB-073, Disciplinary Counsel wrote: "Therefore, based on the foregoing reasons, it is respectfully submitted that the Board's recommendation of disbarment is appropriate to protect the public as well as the profession." (ODC Brief, p.20). In sum, As of April 4, 2003, the sanction of permanent disbarment was not being sought by the Office of Disciplinary Counsel.

10. Thereafter, oral argument was held in this matter. Undersigned counsel avers on information and belief that at argument, counsel for the Office of Disciplinary Counsel contended, **for the first time**, that the sanction of permanent disbarment was not only available, but appropriate.[6]

11. On May 20, 2003, this Honorable Court issued its *per curiam* opinion in these proceedings, in which it imposed the sanction of permanent disbarment upon respondent. In doing so, the Court wrote:

> * * *Nonetheless, we find respondent's conduct in the Small matter is so egregious that ordinary disbarment would be inappropriate. According, we now turn to a discussion of permanent disbarment.
>
> The sanction of permanent disbarment is set forth in the 2001 amendment to Supreme Court Rule XIX, §10, and §24 (footnotes omitted). In our commentary accompanying the amendment, we stated in pertinent part:
>
> In the public interest, the Court has amended Louisiana Supreme Court Rule XIX to codify

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[5]Significantly, in its brief, the Office of Disciplinary Counsel mentions the existence of the sanction (ODC Brief, p. 13), but does not suggest that it is appropriate.

[6]Respondent Donald O. Pinkston was acting *pro se* in all previous proceedings before this Court, including oral argument.

> Permanent Disbarment as an available sanction for attorney misconduct. While the Court has always had the discretion to deny an application for readmission after the requisite five (5)-year waiting period after disbarment, an attorney who is permanently disbarred under these circumstances will be prohibited from applying for readmission to the bar. These amendments reflect the judgment of the Court that in some instances lawyer misconduct may be so egregious as to warrant a sanction of permanent disbarment based on the facts of an individual case and in consideration of the guidelines in Appendix E to the Rules of Lawyer Disciplinary Enforcement.

In Appendix E, we set forth several guidelines illustrating the type of cases which might warrant permanent disbarment. We explained that these guidelines were not intended to bind this court in its decisionmaking, but to provide "useful information to the public and to lawyers concerning the types of conduct the Court might consider to be worthy of permanent disbarment."

Guideline 2 of Appendix E provides that an attorney's "[i]ntentional corruption of the judicial process" is a ground for permanent disbarment. Clearly, respondent's actions in the Small matter must be considered an intentional corruption of the judicial process.

As recently noted in *In re: Morphis,* 01-2803 (La. 12/4/02), ___ So.2d ___ , we do not impose the sanction of permanent disbarment lightly. Nonetheless, we are firmly convinced that we would be remiss in our constitutional duty to regulate the practice of law if we did not impose that sanction here. By making false representations and concealing facts, respondent subverted the judicial process to his own ends. He engaged in conduct that was

> calculated to frustrate the administration of justice. This court cannot and will not condone such conduct by an attorney when high standards of honesty are expected. *See Louisiana State Bar Ass'n v. Haylon,* 250 La. 651, 198 So.2d 391, 392 (1967). Respondent's actions convincingly demonstrate that he does not possess the requisite moral fitness to practice law in this state. He must be permanently disbarred (Footnote omitted).
>
> Accordingly, we will permanently disbar respondent from the practice of law in the State of Louisiana.

(Court's Opinion, pp. 14-15).

12. As specified above, and as is more fully explained below, the imposition of the sanction of permanent disbarment, without notice that the Court considered this sanction to be available, without the opportunity to brief, or fully argue the availability or applicability of the sanction, and without a judicial determination of whether it is legal to impose a sanction that did not exist at the time of the conduct with which respondent was charged, violates several of respondent's constitutional rights.

The procedural due process issue

13. It is beyond dispute that the protections afforded by the due process clauses of the Louisiana and United States Constitutions apply to lawyer disciplinary proceedings. *See, e.g., In re Ruffalo,* 390 U.S. 544, 88 S.Ct. 1222 (1968); *In the matter of Sealed Appellant,* 194 F.3d 666 (5th Cir. 1999); and *Louisiana State Bar Association v. McGovern,* 481 So.2d 574 (La. 1986). Such due process necessarily includes both procedural due process, and substantive due process.

At its most fundamental level, procedural due process includes the right to notice, and the opportunity to be heard, and to defend against the charges or allegations. *LSBA v. McGovern, supra.* The notice component of procedural due process comprises not only notices of the *charges,* but also notice of the *punishment* that might be imposed, particularly when a range of possible punishments exists. *See Lankford v. Idaho,* 500 U.S. 107, 111 S.Ct. 1723 (1991); and *BMW of North America, Inc., v. Gore,* 517 U.S. 559, 116 S.Ct. 1589, 1598 (1996) - "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose" (footnote omitted).

The record in this proceeding is perfectly clear: respondent Donald Pinkston had no notice whatsoever, until the "middle" of oral argument, that the sanction or punishment of permanent disbarment was "available" and being sought by the Office of Disciplinary Counsel. This was, and is constitutionally inadequate notice. Rehearing in this matter should be granted to modify the sanction imposed upon respondent to disbarment, with the right to petition for readmission.

The substantive due process issue

14. As cited above, the respondent in a lawyer disciplinary proceeding also has the right to substantive due process. While this right is intertwined with the right to procedural due process, it has aspects that go beyond it – such as the right to have constitutional claims heard in the disciplinary proceeding. *Middlesex County Ethics Committee v. Garden State Bar Ass'n,* 457 U.S. 423, 102 S.Ct. 2515 (1982). Because of the procedure that

was used in this case, respondent was denied all opportunity to argue that the application of the sanction of permanent disbarment violated the *ex post facto* clauses of the Louisiana and United States Constitution. (*See infra*).

Moreover, on a more basic level, respondent was denied the right to conduct his defense, and to make decisions based upon the possibility of this sanction, and was denied the right to present evidence bearing on the sanction itself. The congruence between this proceeding and the capital proceeding described in *Lankford v. Idaho, supra,* is nearly perfect, and the result should be the same: the sanction imposed should be vacated.

The ex-post facto issue

15. The record in this matter demonstrates that all the conduct in question occurred, and all the formal charges were filed long before August 1, 2001, the date upon which this Court's amendment to Rule XIX, Section 10, took effect. Thus, this case squarely presents the question that was also squarely presented in *In re Parker,* 815 So.2d 794 (La. 2002), *In re Gros,* 815 So.2d 799 (La. 2002), and *In re Patrick,* 815 So.2d 804 (La. 2002): whether the permanent disbarment rules can "operate retroactively because to do so would deprive the respondent-attorney of the right to seek readmission, a right granted to him at the time of the underlying misconduct." *Parker, supra,* pp. 797-798.

The Court did not resolve the question in *Parker*:

> Having considered the record of the instant proceeding in light of the well-presented arguments of the amici and the ODC, we now conclude that we need not resolve the issue of retroactivity of the

> permanent disbarment rules in the context of the present facts.

Parker, supra, p. 798.

To the contrary, the Court expressly reversed it:

> Our decision should not be interpreted as espousing the position advanced by the amici in this case that the date of the misconduct determines whether the permanent disbarment rules should be applied. As noted above, we expressly decline to resolve that issue, and nothing in this opinion should be interpreted as passing on whether we could or could not impose permanent disbarment under these facts.

Parker, supra, p. 798, fn. 7.

Research does not disclose any subsequent case in which the Court has addressed the retroactivity question, although it appears that the Court has been imposing the sanction of permanent disbarment even when the misconduct occurred prior to August 1, 2001. *See, e.g., In re Condoll,* 840 So.2d 502 (La. 2003); *In re Morphis,* 831 So.2d 934 (La. 2002); *In re Elbert,* 840 So.2d 494 (2002), and *In re Hilburn,* 840 So.2d 471 (La. 2002). To put the matter concisely, it appears as though the Court has decided the retroactivity question without addressing it directly, and has decided it in a way that permits the retroactive application of the rule.

This is plain constitutional error. Under any number of U.S. Supreme Court decisions, *see, e.g., Miller v. Florida,* 482 U.S. 423, 107 S.Ct. 2446 (1987), and any number of decisions of this Court, *see, e.g., State v. Loyd,* 689 So.2d 1321 (La. 1997), the retroactive application of any increased penalty violates the ex post facto clauses of the U.S. and Louisiana Constitutions.[7] Given that the

---

[7] Although lawyer disciplinary proceedings are only "quasi-criminal" in nature, there should be little doubt that the prohibi-

[footnote continued]

penalty of permanent disbarment is manifestly a more severe penalty that disbarment with the right to apply for readmission, with its concomitant possibility of readmission, the opinion in this matter should be vacated.

CONCLUSION

Wherefore, respondent Donald O. Pinkston respectfully moves this Court for the entry of an order granting rehearing in this matter, and thereafter, for the entry of an order vacating the sanction of permanent disbarment, and imposing the sanction of disbarment, with the right to apply for readmission after five (5) years.

Respectfully submitted, this 2nd day of June, 2003.

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tion against ex post facto laws is applicable to the penalties imposed in such proceedings. Moreover, even if such proceedings are treated as purely civil in nature, Article 6 of the Louisiana Civil Code would require the *prospective* application of the amendment permitting permament disbarment.

APPENDIX C

SUPREME COURT OF LOUISIANA

IN RE: DONALD O. PINKSTON

DOCKET NO: 2002-B-3251
C/W 2002-B-3252

RESPONSE BY
THE OFFICE OF DISCIPLINARY COUNSEL TO
THE RESPONDENT'S PETITION FOR REHEARING

LOUISIANA ATTORNEY DISCIPLINARY BOARD
DOCKET NO: 99-DB-029

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SUPREME COURT OF LOUISIANA

IN RE: DONALD O. PINKSTON
(Bar Roll No: 17429)

DOCKET NUMBER: 2002-B-3251
c/w 2002-B-3252

RESPONSE BY
THE OFFICE OF DISCIPLINARY COUNSEL TO
THE RESPONDENT'S
PETITION FOR REHEARING

MAY IT PLEASE THE COURT:

PROCEDURAL HISTORY

The first set of formal charges filed against the Respondent which involved the Dwayne Small matter were filed in April, 1999. The disciplinary hearing on those formal charges was held on December 14, 2000. In his pre-hearing memorandum, the Respondent indicated that he would not be calling any witnesses to testify at the hearing and acknowledged that **disbarment would be the only appropriate sanction** if the charges were proven by clear and convincing evidence.

In May, 2001, the Hearing Committee issued its recommendation finding that all of the allegations of fact set forth by the Office of Disciplinary Counsel had been proven by clear and convincing evidence. The Hearing Committee recommended that the Respondent be dis-

barred. The matter was scheduled for board panel argument thereafter.

While this matter was pending both before the Hearing Committee and the Disciplinary Board, the Louisiana State Bar Association through its House of Delegates voted to recommend to the Louisiana Supreme Court that it amend its rules to expressly provide for the sanction of "permanent disbarment". Subsequent thereto, a Supreme Court committee was organized to evaluate the LSBA recommendation and report back to the Court. Thereafter, and effective August 1, 2001, the Louisiana Supreme Court amended sections of Rule XIX to expressly provide for its pre-existing authority to permanently disbar an attorney from the practice of law. Hence, the Supreme Court's order came after the Hearing Committee recommendation, but long before the Disciplinary Board panel arguments in these proceedings.

On December 30, 2002, the Disciplinary Board rendered its recommendations to the Louisiana Supreme Court once again recommending that the Respondent be disbarred from the practice of law. Shortly after the Disciplinary Board's recommendations were lodged with this Court, the Respondent filed an objection to the Board's recommendation and the matter was scheduled for briefing and argument.

The Respondent chose to represent himself before the Court during oral argument. During the course of oral argument, the Office of Disciplinary Counsel was specifically asked by a member of the Court whether or not the type of misconduct engaged in by the Respondent (particularly the Small matter) would meet the criteria for consideration of permanent disbarment. In response to the Supreme Court members' questions, the Office of Disciplinary Counsel asserted that the Respondent's

action certainly appeared consistent with Guideline 2 found in Appendix E to Rule XIX, "Intentional Corruption of the Judicial Process".

In due course, this Honorable Court issued its decision permanently disbarring the Respondent from the practice of law. On June 2, 2003, the Respondent, Donald O. Pinkston asked for a rehearing on the issue of sanction.

LAW AND ARGUMENT

The Respondent's request for rehearing appears to have been filed on or about June 2, 2003 and prior to this Court's decision in the consolidated cases of *In Re: Laudumiey* and *In Re: Mann* decided on June 27, 2003. The decision in that consolidated disciplinary matter, coupled with the Court's prior decision in the matter of *In Re: Nicholas Morphis,* appears to be dispositive of most if not all of the objections raised by the Respondent.

The Respondent's request for rehearing asserts that permanently disbarring him from the practice of law falls outside the authority of this Court because the conduct for which he stands assused took place before the effective date of the amendment to Rule XIX; that he did not receive notice of the Office of Disciplinary Counsel's intent to seek permanent disbarment prior to the Court's final decision; and that application of the amendments to Rule XIX which provided for permanent disbarment amount ot an *ex post facto* law.

At the outset it is important for this Court to recall what the Office of Disciplinary Counsel believes to be an important factor. **Donald Pinkston chose not testify in his own disciplinary hearing; Donald Pinkston chose not to call a single witness in his defense nor in mitigation.**

Indeed, Donald Pinkston conceded prior to his disciplinary hearing that if the Office of Disciplinary Counsel was able to carry its burden by clear and convincing evidence, he deserved to be disbarred. Now that the sanction of permanent disbarment has been visited upon him, Mr. Pinkston claims that he might well have presented a defense or perhaps mitigation had he known that the disbarment that he faced was a permanent one rather than one which would afford him an opportunity to apply for readmission. Most respectfully it is suggested that the argument is entirely unpersuasive.

It strains one's sense of reason to believe that had Mr. Pinkston a defense to the formal charges he would not have produced it at a hearing where admittedly the Office of Disciplinary Counsel was seeking disbarment. Indeed, even if Donald Pinkston were not in a position to contest the underlying factual allegations against him, one would certainly have expected Mr. Pinkston to have presented some form of mitigation, anything. In this instance, he did neither. It hardly gains Mr. Pinkston any credibility to now suggest, after the fact, that if only he had known permanent disbarment was option he would have defended himself and presented evidence in mitigation. Having presented those opportunities, he chose not to do so. He should not now be allowed to profit from a tactical decision which he apparently now regrets.

In the matter of *In Re: Nicholas Morphis,* 831 So.2d 934 (La. 2002), the Respondent was interimly suspended by the Supreme Court following an Office of Disciplinary Counsel request that he be suspended to protect the public. See *In Re: Morphis,* 701 So.2d 1324 (La. 1997). Formal charges were filed against Morphis in 1999 and a hearing committee later recommended that the Respond-

ent be disbarred from the practice of law. The Disciplinary Board concurred in the hearing committee's recommendation and urged that the respondent be disbarred and ordered to make payment of full restitution to all of his victims. The Supreme Court received the Disciplinary Board's recommendation on October 18, 2001, nearly 2½ momths after it amended Louisiana Supreme Court Rule XIX to expressly provide for permanent disbarment. When neither the Respondent nor the Office of Disciplinary Counsel objected to the Disciplinary Board's recommendation of disbarment, the Court on its own motion ordered the case docketed for oral argument and the parties were directed to address whether the sanction of permanent disbarment was appropriate.

After receiving briefs and argument, the Court rendered its decision wherein it once again recognized that a disbarred attorney has no absolute right to seek readmission after the passage of five years, and under the Court's plenary constitutional authority to regulate the practice of law, the Court has on occasion extended the minimum period for readmission from disbarment. Noting that Morphis' conduct met at least one of the illustrative guidelines set forth in Appendix E to Rule XIX, the Supreme Court concluded that it would be remiss in its constitutional obligation to regulate the practice of law if permanent disbarment was not imposed against Morphis.

Later the issue was more directly presented to the Court in *Laudumiey* and *Mann*, 2003-B-0234 (6/27/-2003), 2003 WL 21480392 (La. 2003) decided by the Court on June 27, 2003. In deciding the so called retroactive application of "permanent disbarment" the Court specifically addressed whether or not the sanction of permanent disbarment" may be applied to conduct which occurred prior to the August 1, 2001 effective date of the relevant amendments. As the Supreme Court made clear,

August 1, 2001 effective date of the relevant amendments. As the Supreme Court made clear, the amendments of Supreme Court Rule XIX, Sections 10 and 24:

> ". . . do not redefine the respondent's conduct, which remains controlled by the Rules of Professional Conduct in effect at the time of their offense. However, respondents contend that the amendments have the effect of increasing the penalty they may receive for their misconduct.
>
> The fallacy in respondents' argument is that nothing in the amendments to Supreme Court Rule XIX, Sections 10 and 24 alter the penalties a lawyer may receive for professional misconduct. Both prior to and after the amendment, the most serious sanction a lawyer may receive under Rule XIX is the sanction of disbarment. The only change effected by the amendments relates to the ability of a disbarred attorney to seek readmission. However, respondents maintain that the elimination of this "right" to seek readmission exposes them to greater sanction than they could have received at the time of their misconduct.
>
> Respondents have pointed to no constitutional authority or jurisprudence from which this court would indicate a disbarred attorney has a "right" to seek readmission to the bar of this state. The five year minimum period for seeking readmission, as set forth in Supreme Court Rule XIX, Section 24, is a rule of procedure that does not vest any substantive right in the attorney. The procedural nature of the rule is illustrated by our decision in *In Re: White,* 00-2732 (La. 4/25/01), 791 So.2d 602, and *Louisiana State Bar Ass'n. vs. Krasnoff,* 502 So.2d 1018 (La. 1987), in which we held that the minimum period for applying for readmission may be extended

> or otherwise modified at our discretion. Thus, is clear that our rules create no substantive right to seek readmission."

Thereafter, the Supreme Court made clear in the *Laudumiey* and *Mann* decision that its amendments to Rule XIX, Sections 10 and 24 did not represent substantive changes to the substantive bar discipline rules nor did those changes result in the adoption of a new sanction which did not previously exist. The Court made clear, "Given this court's absolute discretion over readmission, it is beyond dispute that this court has always had the unfettered authority to refuse readmission to disbarred attorneys, including the right to do so on a permanent basis."

Finally, the Court concluded that the amendments to Supreme Court Rule XIX, Sections 10 and 24 did not create a new penalty. "Accordingly, we conclude there is no merit to Respondent's argument that these amendments constitute prohibited *ex post facto* laws."

THE NOTICE ISSUE

The single issue raised by the Respondent which arguably has not been explicitly addressed by this Court is what can best be described as the "notice issue". In essence, the Respondent suggests that notice of the sanction sought by the Office of Disciplinary Counsel or to be imposed by the Court is a fundamental part of due process which he has been denied. The Respondent's theory, while novel, is unavailing.

At the outset it is once again important to emphasize the timeline which has previously been set out hereinabove. Within ninety days of the Hearing Committee opinion and recommendation, this Court amended Rule

XIX, Section 10 and 24, and published Appendix E which included Guideline 2 listing as a potential consideration for permanent disbarment an attorney's corruption of the judicial process, the precise conduct found to have been engaged in by the Respondent in connection with the Dwayne Small matter. Further, it is undeniable that the Respondent acknowledged to both the Hearing Committee and the Board that if the factual allegations brought against him were proven by clear and convincing evidence that the appropriate sanction was disbarment. That he faced banishment from the practice of law must be (and has been) conceded by the Respondent. The Office of Disciplinary Counsel has always sought Respondent's disbarment; the Respondent acknowledged that disbarment is appropriate for proven misconduct as alleged; and the Supreme Court's order imposes disbarment. Clearly, the Respondent had notice from the outset and throughout these proceedings that he faced disbarment.

The sole issue is whether the Respondent was entitled to a formal statement from either the Office of Disciplinary Counsel or the Court that his discipline might include a permanent ban on his filing an application for readmission. Clearly, he is not.

The Respondent does not now, not has he ever suggested that the formal charges failed to put him on notice of the facts and conduct that he has been accused of engaging in. Nor does the Respondent suggest that he was not fairly informed of the nature of the charges against him to permit him to prepare a defense. Lastly, the Respondent does not (nor could he) suggest that the substantive rules violated were not fully in force and in effect at the time his actions occurred.

In the matter of *In Re: Ruffalo,* 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed. 2nd 117 (1968), the United States Supreme Court concluded that under the due process clause, a finding of misconduct cannot be predicated upon evidence introduced at a disciplinary hearing if the lawyer had no prior notice of the charge. The formal charges need not even specify the precise rule of professional conduct that is alleged to have been violated. *Phelps vs. Kansas Supreme Court,* 662 F.2d 649 (10th Cir. 1981).

The Office of Disciplinary Counsel was able to locate no case law which would suggest that notice of the sanction to be imposed in a lawyer disciplinary hearing matter rises to the level of protections afforded under the due process clause. Indeed, at least one case with some striking similarities appears to hold to the contrary.

In the case of *Dixon vs. State Bar of California,* 32 Cal.3rd 728, 653 P.2d 321, 187 Cal. Rptr. 30 (Cal. 1982), the respondent claimed that prior to the hearing of his disciplinary case, he had not been advised by the California Bar Counsel of the discipline being sought. The Supreme Court of California held that notice was required only of the charges against him, not the sanction being sought. In what the California Court seemed to suggest was the most serious count of misconduct, the respondent:

> ". . . knowingly filed false statements with the court, seeking to deceive the judge with regard to the client's financial condition;"

The similarities to the case at bar are indeed striking.

This Court has held for decades that it has the sole and exclusive jurisdiction, authority and discretion to regulate the practice of law including the discipline to be imposed,

and whether to permit reinstatement or readmission. Neither the recommendation of hearing committees or the Disciplinary Board nor the suggestion by the Office of Disciplinary Counsel of the type of sanction sought, are in any way binding upon the Court. Indeed, little would be gained by trying to catalog the numerous cases where the Court has imposed discipline (both more onerous and less so) than that recommended or sought by the Office of Disciplinary Counsel.

Nothing in Supreme Court Rule XIX or in the jurisprudence of this state suggests or supports that a respondent must receive notice of the severity of sanction sought to be imposed. Every lawyer must be held to know that a violation of the Rules of Professional Conduct holds the potential for the imposition of sanctions including an expulsion from the profession. Nothing more or less has occurred in this case.

The true crux of the Respondent's argument lies in his assertion that he had no notice that the Court's decision might preclude his ability to file an application for readmission at some later date. This Court's decision in the case of *Laudumiey* and *Mann* slams shut the basic underpinnings of the Respondent's theory in that regard.

Once again, the Court in those cases made clear in unequivocal language, that Louisiana has never created a "substantive right" to seek readmission. Therefore, elimination of the procedural ability to file an application for readmission did not and could not deprive the Respondent of a "substantive right" which this Court has held does not exist.

With or without this Court's amendment to Rule XIX, the Respondent knew or certainly should have known that, "given this court's absolute discretion over readmission, it is beyond dispute that this court has always

had the unfettered authority to refuse readmission to disbarred attorneys, including the right to do so on a permanent basis."

In essence, the Respondent now seeks an extension of his opportunity to brief and orally argue his sanction. Clearly, predicated upon the questions which were posed to both the Office of Disciplinary Counsel and the Respondent during oral argument, Donald O. Pinkston was given the opportunity to request a sanction which would have left open for him the opportunity to file for readmission at a later date. Given the often conflicting and often incredulous statements made by the Respondent to the Court during oral argument, it is not surprising that this Court was neither moved nor persuaded by his pleas. His lack of success should not form a basis for this Court's grant of rehearing.

CONCLUSION

The Respondent Donald Pinkston was ordered permanently disbarred by a unanimous Court opinion issued May 20, 2003. On June 2, 2003, Mr. Pinkston sought a rehearing on several grounds, most of which were the subject of a subsequent decision by this Court in the matter of *Laudumiey* and *Mann*. It is respectfully submitted that the constitutional arguments advanced by the Respondent, having previously been addressed by the Supreme Court, form an insufficient basis for the Respondent's request for rehearing. Additionally, the Respondent should not now be heard to complain about the penalty which has been imposed upon him when he was provided with every opportunity to testify and present factual evidence in opposition to the formal charges and/or in mitigation. Mr. Pinkston should not today be permitted to profit for a tactical decision which he made prior to

his disciplinary hearing. The Respondent's request for rehearing should be denied.

Respectfully submitted,

OFFICE OF DISCIPLINARY COUNSEL

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APPENDIX D

[Filed MAY 20 2003]

SUPREME COURT OF LOUISIANA

NO. 02-B-3251

c/w

NO. 02-B-3252

IN RE: DONALD O. PINKSTON

ATTORNEY DISCIPLINARY PROCEEDINGS

PER CURIAM

This disciplinary proceeding involves six counts of misconduct[1] stemming from two sets of formal charges filed by the Office of Disciplinary Counsel ("ODC") against respondent, Donald O. Pinkston, an attorney licensed to practice law in Louisiana but currently suspended from the practice of law for conduct unrelated to the instant proceedings.

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[1] The matter originally involved a total of eight counts. Two of the counts were dismissed by the hearing committee, based on a finding that the ODC failed to prove these charges by clear and convincing evidence. The ODC has not objected to this finding; accordingly, these counts will not be addressed further.

UNDERLYING FACTS

Small Matter

In 1993, Dwayne Small, respondent's stepson, pled guilty to manslaughter pursuant to a plea agreement in Orleans Parish Criminal District Court, Section "C." Mr. Small was sentenced to twenty-one years in prison and began serving his sentence. In 1995, respondent enrolled as counsel of record for Mr. Small and filed a Motion to Correct an Excessive Sentence alleging the court erred in failing to apply the sentencing guidelines to Mr. Small's plea agreement, which when applied would warrant imposition of a shorter sentence. The district attorney's office filed an objection to respondent's motion urging it was illegal to amend a sentence imposed at hard labor after a criminal defendant started serving his time. Additionally, he asserted there was no law mandating the application of sentencing guidelines to plea agreements.

At a hearing conducted on June 25, 1996 by Judge Ike Spears, who was sitting ad hoc in Section "C," respondent alleged on numerous occasions that he had personally spoken with the district attorney and was assured the State of Louisiana would not object to his motion. Based on respondent's representations, Judge Spears reduced Mr. Small's sentence from twenty-one years to twelve years, but stayed the effect of the order to enable the State to file writs.

Days later, the district attorney's office filed a motion seeking reconsideration of the sentence reduction. Judge Spears kept the stay in place and again continued hearings of the State's motion to permit respondent an opportunity to confirm his purported agreement with the district attorney's office. When respondent was unable to

do so, Judge Spears granted the State's motion to reconsider and reinstated Mr. Small's original twenty-one year sentence.

Prior to a scheduled status conference, Judge Sharon Hunter was elected to fill the vacancy in Section "C," and the matter passed to her. In November 1996, she held the status conference and determined the matter was closed. The docket entry reflected: "the status hearing considered held and satisfied."

Thereafter, respondent filed a "Motion to Correct an Illegal Minute Entry" in Mr. Small's case. For unexplained reasons, that motion appeared on the docket of Section "G," Presided over by Judge Julian Parker.[2] At the hearing on the motion, respondent represented to Judge Parker that an administrative error had taken place since Judge Spears had imposed a twelve-year sentence on Mr. Small when the actual sentence should have been nine years. Based on the representations made by respondent, Judge Parker vacated the prior sentence and resentenced Mr. Small to nine years.[3] As a result, Mr.

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[2]In a subsequent hearing, respondent stated the case was remanded to Section "G" by Judge Hunter who recused herself from the matter. However, at another hearing, respondent professed to be unaware as to why the case appeared on the docket in Section "G." He stated: "Your Honor, I have no idea. I have no connections with this building. I have no connections with Judge Hunter. I have no connections with the court. All I know is that the case was on the docket, I received a subpoena, I showed up." Later, in oral argument before this court, respondent indicated that he had not received a subpoena in the case, but was in Section "G" on an unrelated matter when the case was called.

[3]Judge Parker was apparently unaware of Judge Spears' earlier judgment reinstating the original sentence of twenty-one years. In subsequent appellate proceedings, Judge Parker explained the minute entry reflecting Judge Spears' reversal of the June 25, 1996 ruling and reinstating the sentence of twenty-one years was "missing" from the record when he acted on the case.

Small was entitled to an immediate release from prison.

Subsequently, Judge Parker reviewed the complete record and learned Judge Spears had in fact reinstated the twenty-one year sentence. Judge Parker advised the parties it was not his intent to re-sentence Mr. Small; rather, he believed, based on what he characterized as "erroneous and misleading representations" from respondent, that he was merely correcting an administrative error of Judge Spears. Accordingly, Judge Parker rescinded his earlier ruling and reinstated Mr. Small's original sentence of twenty-one years. He ordered respondent to turn Mr. Small back into the custody of the State of Louisiana.

The ODC later conducted an investigation into respondent's activity in the Small matter.

McDonald Matter

In May 1996, Kenneth McDonald retained respondent for $3,500 to assist him in his criminal matter pending in the United States District Court for Eastern District of Louisiana. There was no written contract of employment between the parties. At the time, Mr. McDonald was already represented by New Orleans criminal defense attorney Frank DeSalvo. Nonetheless, Mr. McDonald wanted respondent to pursue the scheduling of an expeditious bond hearing and negotiate a plea agreement more favorable than that obtained by Mr. DeSalvo.

Subsequently, respondent met with Mr. McDonald on a few occasions and spoke on one or more times with the Assistant U.S. Attorney assigned to the case.[4] Ulti-

[4]Mr. DeSalvo wrote to the ODC that, to his knowledge, respondent had contacted on one occasion the U.S. Attorney, who advised that he would not discuss or negotiate the matter because respondent was not counsel of record. According to Mr. DeSalvo, respondent had essentially no part in the criminal matter.

mately, Mr. McDonald did not get a bond hearing and he pled guilty relative to an agreement negotiated by Mr. DeSalvo.

On February 28, 1997, Mr. McDonald filed a complaint with the ODC advising that respondent failed to take any action to pursue his legal matter and refused to return the unearned legal fee, despite repeated requests. Contrary to his testimony at the formal hearing, respondent denied he was retained as counsel in the matter since Mr. McDonald was already represented by Mr. DeSalvo. Later, respondent erroneously stated he was retained after Mr. McDonald had already pled guilty and that respondent's role was "would be to counsel and assist [Mr. McDonald] in calculating the guidelines and searching in the calculation and appealing his sentence if necessary."

Isaac Matter

In February 1997, Ammie McCrainey Isaac retained respondent for $5,000 to represent her son, Emanuel Isaac, in criminal appellate proceedings. Following a multiple bill hearing, Mr. Isaac was sentenced to twenty years for manslaughter. Respondent filed a timely notice of appeal. Almost one year and one-half after he was retained, respondent wrote to Ms. Isaac stating the appeal was filed on January 26, 1998. However, while the appeal record in the case was lodged with the court of appeal, the transcript of the hearing and sentencing on the multiple bill were not included. Finding these transcripts to be "essential" for appellate review, the court of appeal ordered respondent five times between January and May 1998 to "take necessary steps to have [the] transcript prepared and forwarded to the Clerk of this Court." After the record was ultimately supplemented,

the court of appeal had to order respondent on three occasions between June and November 1998 to file his assignments of error and brief. Although respondent was granted numerous extensions of time to submit such, he failed to timely comply with the court's orders. When respondent finally complied with the court's order on November 2, 1998, the brief relative to the appeal of the trial and sentencing in Mr. Isaac's homicide case consisted of one assignment of error in a three-page brief.

Subsequently, respondent was suspended from practice of law on unrelated charges in *In re: Pinkston,* 98-1926 (La. 12/1/98), 728 So.2d 381. As a result, Ms. Isaac retained other counsel, who filed a supplememental brief and completed the appellate representation. She asked that respondent provide an accounting and return the unearned fee, but he failed to do so.

Alston Matter

In early 1997, Felishia Alston, a California resident, filed a complaint against respondent alleging she retained respondent for $8,000 to represent Dalshawn Boson in criminal proceedings pending in Orleans Parish Criminal District Court. She contended respondent neglected the legal matter, failed to communicate with his client and withdrew from the representation prior to completing the matter, as well as refused to account for or return the unearned portionof the fee. Ultimately, the parties submitted to alternative fee dispute arbitration through the Louisiana State Bar Association. On November 17, 1998, the appointed arbitrator rendered a written decision finding respondent incompetently and negligently handled the criminal matter, as well as failed to communicate with his client. She concluded respondent owed Ms. Alson $3,000 of the advanced fee. Subsequently, when

respondent neglected to pay any portion of the owed fee, Ms. Alston had to retain counsel to file a civil action against respondent. Ms. Alston obtained a judgment against respondent, but respondent failed to satisfy the judgment.

Jones Matter

On December 11, 1998, this court rendered an order in *In re: Pinkston*, 98-1926 (La. 12/11/98), 728 So.2d 381, suspending respondent from the practice of law for a period of two years. After this court denied respondent's application for rehearing (making the suspension a final judgment), respondent accepted payment of $1,000 from Hilda Jones for the criminal representation of her son. Subsequently, Ms. Jones learned of respondent's suspension from practice when he failed to appear for a court hearing in her son's case. Respondent refused to refund the fee until August 1999, when prompted by Ms. Jones' filing of a disciplinary complaint with the ODC.

Motton Matter

In 1995, Agnes Motton and Zina Nunnery retained respondent for $2,300 to represent Frank Motton in post-conviction criminal proceedings pending in Orleans Parish Criminal District Court. Mr. Motton had been convicted of first degree murder and sentenced to life in prison. Respondent filed an application for post-conviction relief raising a claim of newly-discovered evidence. According to court records, the matter was scheduled for an evidentiary hearing, but was rescheduled on three occasions for various reasons. After March 1996, respondent failed to take any action in the case, nor did he refund his unearned fee, despite repeated requests.

In January 1998, Ms. Motton and Ms. Nunnery filed a complaint with the ODC advising of respondent's neglect of a legal matter, failure to communicate and failure to return the unearned fee. While respondent filed a response denying any misconduct on his part, he conceded he neglected to complete the legal matter due to his suspension in *In re: Pinkston*, 98-1926 (La. 12/11/98), 798 So.2d 381, and agreed he owed a refund of some portion of the fee.

DISCIPLINARY PROCEEDINGS

Formal Charges

After investigation, the ODC filed two separate sets of formal charges against respondent. The first set, filed in April 1999, involved the Small matter and alleged violations of Rules 1.2(c) (counsel or encourage a client to engage in conduct that the lawyer knows is criminal or fraudulent), 3.3(a)(1) (false statement of material fact or law to a tribunal), 3.3(a)(2) (conceal that which attorney is required by law to reveal), 3.3(a)(4) (offer evidence known to be false), 8.4(a) (violating the Rules of Professional Conduct), 8.4(c) (engaging in conduct involving deceit, dishonesty, fraud, or misrepresentation) and 8.4(d) (engaging in conduct prejudicial to the administration of justice) of the Rules of Professional Conduct.

In May 2001, the ODC filed a second set of charges, involving the McDonald, Isaac, Alston, Jones and Motton matters. These charges alleged Rules 1.3 (lack of diligence), 1.4 (failure to communicate), 1.5 (failure to refund client funds), 1.15(b) (failure to promptly account for and deliver funds or property owed to a client or third party), 1.16(d) (failure to protect client interests upon termination of representation), 5.5(a) (unauthor-

ixed practice of law), 8.1(a) (knowingly make a false statement of material fact in connection with a disciplinary matter or bar admission matter or application), 8.4(a) (violating the Rules of Professional Conduct), 8.4(c) (engaging in conduct involving deceit, dishonesty, fraud, or misrepresentation) and 8.4(d) (engaging in conduct prejudicial to the administration of justice) of the Rules of Professional Conduct.

Respondent filed answers to both sets of formal charges. Separate hearings were conducted before different hearing committees.

Recommendations of the Hearing Committees

With regard to the Small matter, the hearing committee concluded respondent made several misrepresentations to Judge Parker, specifically, that Judge Hunter had recused herself, Judge Spears had reduced Mr. Small's sentence to twelve years when the twenty-one year sentence had been reinstated, and that the minute entry by Judge Spears was erroneous and should be corrected to further reduce Mr. Small's sentence to nine years. The hearing committee noted the misrepresentations resulted in the temporary release of Mr. Small from prison. Further, the committee found, while it was not clear whether respondent improperly caused the transfer to Judge Parker's section, respondent "nevertheless took advantage of it" to obtain the illegal release of his stepson.

Based on these conclusions, the hearing committee found respondent violated Rules 3.3(a)(1) (false statement of material fact or law to a tribunal), 3.3(a)(2) (conceal that which attorney is required by law to reveal), 3.3(a)(4) (offer evidence known to be false), 8.4(a) (violating the Rules of Professional Conduct), 8.4(c) (engaging in conduct involving deceit, dishon-

esty, fraud, or misrepresentation) and 8.4(d) (engaging in conduct prejudicial to the administration of justice) of the Rules of Professional Conduct.

The committee recognized respondent's cooperation in the disciplinary proceedings as a mitigating factor. As aggravating factors, the committee identified respondent's prior disciplinary record[5] and substantial experience in the practice of law. Applying these factors to the baseline sanction of disbarment, the committee concluded disbarment is appropriate under the facts.

A separate hearing committee heard the McDonald, Isaac, Alston, Jones and Motton matters. This committee found as follows:

In the McDonald matter, the committee concluded respondent violated Rule 1.5(f)(6) by failing to refund client funds, as he led Mr. McDonald to reasonably believe that, for $3,500 he would successfully obtain a bond hearing or favorable sentencing, which respondent failed to do.

In the Isaac matter, the committee found respondent failed to diligently pursue Mr. Isaac's appeal and failed to adequately communicate with his client, in violation of Rule 1.3.

In the Alston matter, the committee determined respondent engaged in conduct prejudicial to the adminis-

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[5] In *In re: Pinkston*, 98-1926 (La. 12/11/98), 728 So.2d 381, respondent was suspended from the practice of law for a period of two years for failure to maintain clients' funds in trust and failure to pay a third party medical provider over a period of several years. Respondent has not sought readmission. Additionally, respondent was admonished on four prior occasions between 1994 and 1995 for failing to respond to disciplinary complaints. Finally, in 1997, respondent was reprimanded for misleading clients, failing to return unearned fees and commingling of client funds.

tration of justice in violation of Rule 8.4(d) when he failed to satisfy his $3,000 obligation owed to Ms. Alston.

In the Jones matter, the committee concluded respondent violated Rule 1.5(f)(6) when he failed to refund the $1,000 retainer fee paid by Ms. Jones in connection with her son's criminal matter at the time he was suspended from the practice of law.

In the Motton matter, the committee found violations of Rules 1.3 (lack of diligence) and 1.5(f)(6) (failure to refund client funds) based on respondent's admission that there were several hearing continuances over a period of several years on Mr. Motton's writs for habeas corpus and that he did not earn the entirety of the fee paid. While the committee stated there was evidence that respondent did not fully communicate with his clients, the committee neglected to find a violation of Rules 1.4 (failure to communicate) and 1.16(d) (failure to protect client interests at termination of representation).

As aggravating factors, the committeed notes respondent's prior disciplinary record, pattern of misconduct and substantial experience in the practice of law. The sole mitigating factor was respondent's cooperation in the disciplinary proceedings. Applying these factors to the baseline sanction of suspension, the committee recommended a thirty-month suspension and payment of restitution to Mr. McDonald, Mr. Isaac, Ms. Alston, Ms. Motton and Ms. Nunnery.

Recommendation of the Disciplinary Board

With minor modifications, the disciplinary board accepted the factual findings of the hearing commit-

tees.[6] The board found respondent knowingly and intentionally violated duties owed to his clients, the public, the legal system and the profession. As to the Small matter, the board stated the actual injury to the legal system and the public was present in that respondent misrepresented the true status of Mr. Small's sentence to the court "and Mr. Small, a violent criminal, was released from prison years before his scheduled release date." As to the remaining client matters subject of the instant proceedings, the board stated actual injury resulted from respondent's neglect of legal matters, failure to provide accountings and return unearned fees to his clients.

The board adopted the mitigating and aggravating factors cited by the committees, as well as found respondent's substantial experience in the practice of law should have been considered as an aggravating factor. Finding respondent's actions show his lack of regard for his clients and for his professional obligations as a member of the bar, the board recommended that respondent be disbarred from the practice of law. It further ordered respondent to make restitution to his victims.

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[6]The board found minor errors regarding the committee's findings relative to the McDonald, Isaac and Motton matters. As to the McDonald matter, the board concluded the commmittee erred in failing to find a violation of Rule 8.4(a) (violating the Rules of Professional Conduct), although it admitted this finding added little, if anything, to the sanction imposed. As to the Isaac matter, the board determined the committee erred in finding violations of Rule 1.4 and 1.5(f)(6) since respondent was not charged with a violation of these rules, but found the committee erred in failing to find a violation of Rule 1.16(f) (failure to protect client interests at termination of representation) as respondent did not notify Ms. Isaac of his suspension, surrender her property and refund any unearned fees. Lastly, as to the Motton matter, the board pointed out that, although there was evidence respondent did not adequately communicate with his clients, the committee neglected to find a violation of Rule 1.4 (failure to communicate).

Respondent filed an objection to the disciplinary board's recommendation. Accordingly, the matter was docketed for briefing and argument in accordance with Supreme Court Rule XIX, §11(G).

DISCUSSION

Bar disciplinary matters come within the original jurisdiction of this court. La. Const. art. V, §5(B). Consequently, we act as triers of fact and conduct an independent review of the record to determine whether the alleged misconduct has been proven by clear and convincing evidence. *In re: Quaid,* 94-1316 (La. 11/30/94), 646 So.2d 343, 348; *Louisiana State Bar Ass'n v. Boutall,* 597 So.2d 444, 445 (La. 1992). While we are not bound in any way by the findings and recommendations of the hearing committee and disciplinary board, we have held the manifest error standard is applicable to the committee's factual findings. See *In re: Caulfield,* 96-1401 (La. 11/25/96), 683 So.2d 714; *In re: Pardue,* 93-2865 (La. 3/11/94), 633 So.2d 150.

The record supports the hearing committees' findings that the charges against respondent have been proven by clear and convincing evidence.

In the Small matter, the only logical conclusion to be drawn from the evidence is that respondent intentionally and deliberately misrepresented the facts to the court in an effort to obtain a more lenient sentence for Mr. Small. Respondent initially represented to Judge Spears that the district attorney's office had agreed not to oppose the motion to reduce Mr. Small's sentence, when in fact it should have been obvious to respondent that no such agreement had been made by the district attorney's office. Based on respondent's false representations,

Judge Spears reduced Mr. Small's sentence. After Judge Spears reinstated Mr. Small's sentence, the case mysteriously appeared on Judge Parker's docket in another section of court. Respondent has offered no cogent explanation of how the case ended up in that section. At one point, he indicated that the transfer was based on the recusal of a judge; at another time, he indicated the case simply appeared on the docket to his surprise, and he was fortuitously in that section of court at the time the case was called. In any event, respondent represented to Judge Parker that he was simply asking to correct an administrative error in a minute entry, which would result in Mr. Small being sentenced to nine years. At no time did respondent call Judge Parker's attention to the fact that Judge Spears had reinstated Mr. Small's sentence to twenty-one years. Based entirely on respondent's representations, which Judge Parker later characterized as "erroneous and misleading," Mr. Small's sentence was reduced to nine years, entitling him to an immediate release.

Although respondent adamantly asserts he had no improper motives in this matter, he offers no evidence in support of his contentions. Rather, he simply asks this court to disbelieve every witness who testified in these proceedings, including the trial judges and a representative of the district attorney's office, who were found to be credible by the hearng committee. We are not prepared to disregard to findings of fact made by the hearing committee. Accordingly, we find the charges in the Small matter are proven by clear and convincing evidence.

In the remaining matters, the record clearly demonstrates respondent neglected legal matters, failed to promptly provide accountings and failed to return un-

earned fees to his clients. The charges in these matters display a didturbingly similar scenario in which respondent collects fees for a criminal representation, neglects the matter and then refuses to refund his unearned fees.

Having found evidence of professional misconduct, the sole issue presented for our consideration is the appropriate sanction for respondent's actions. In determining a sanction, we are mindful that disciplinary proceedings are designed to maintain high standards of conduct, protect the public, preserve the integrity of the profession, and deter future misconduct. *Louisiana State Bar Ass'n v. Reis,* 513 So.2d 1173 (La. 1987). The discipline to be imposed depends upon the facts of each case and the seriousness of the offenses involved, considered in light of any aggravating and mitigating circumstances. *Louisiana State Bar Ass'n v. Whittington,* 459 So.2d 520 (La. 1984).

In the Small matter, respondent's conduct unquestionable violates Rule 3.3, in that he made false statements to a court and concealed evidence from the court which he should have revealed. Such practices "violate the most fundamental duty of an officer of the court." Commentary to Standard 6.11 of the *ABA Standards for Imposing Lawyer Sanctions.* As explained by Standard 6.11, the baseline sanction for violations of Rule 3.3 is disbarment. Nonetheless, we find respondent's conduct in the Small matter is so egregious that ordinary disbarment would be inappropriate. Accordingly, we now turn to a discussion of permanent disbarment.

The sanction of permanent disbarment is set forth in the 2001 amendment to Supreme Court Rule XIX,

§10[7] and §24.[8] In our commentary accompanying the amendment, we stated, in pertinent part:

> In the public interest, the Court has amended Louisiana Supreme Court Rule XIX to codify Permanent Disbarment as an available sanction for attorney misconduct. While the Court has always had the discretion to deny an application for readmission after the requisite five (5)-year waiting period after disbarment, an attorney who is permanently disbarred under these circumstances will be prohibited from applying for readmission to the bar. These amendments reflect the judgment of the Court that in some instances lawyer misconduct may be so egregious as to warrant a sanction of permanent disbarment based on the facts of an individual case and in

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[7] Supreme Court Rule XIX, §10(A) was amended to add the highlighted language:

> (1) Disbarment by the court. **In any order or judgment of the court in which a lawyer is disbarred, the court retains the discretion to permanently disbar the lawyer and permanently prohibit any such lawyer from being readmitted to the practice of law.**

[8] Supreme Court Rule XIX, §24(A) was amended to add the highlighted language:

> A disbarred lawyer or a suspended lawyer who has served a suspension period of more than one year, exclusive of any waivers or periods of deferral, shall be reinstated or readmitted only upon order of the court. . . . No lawyer may petition for readmission until five years after the effective date of disbarment. A lawyer who has been placed on interim suspension and is then disbarred for the same misconduct that was the ground for the interim suspension may petition for readmission at the expiration of five years from the time of the effective date of the interim suspension. **The court retains the discretion, in accordance with Section 10A of this rule, to permanently disbar a lawyer and permanently prohibit any such lawyer from being readmitted to the practice of law.**

consideration of the guidelines in Appendix E to the Rules of Lawyer Disciplinary Enforcement.

In Appendix E, we set forth several guidelines illustrating the type of cases which might warrant permanent disbarment. We explained that these guidelines were not intended to bind this court in its decisionmaking, but to provide "useful information to the public and to lawyers concerning the types of conduct the Court might consider to be worthy of permanent disbarment."

Guideline 2 of Appendix E provides that an attorney's "[i]ntentional corruption of the judicial process" is a ground for permanent disbarment. Clearly, respondent's actions in the Small matter must be considered an intentional corruption of the judicial process.

As recently noted in *In re: Morphis,* 01-2803 (La. 12/4/02), ___ So.2d ___, we do not impose the sanction of permanent disbarment lightly. Nonetheless, we are firmly convinced that we would be remiss in our constitutional duty to regulate the practice of law if we did not impose that sanction here. By making false representations and concealing facts, respondent subverted the judicial process to his own ends. He engaged in conduct that was calculated to frustrate the administration of justice. This court cannot and will not condone such conduct by an attorney when high standards of honesty are expected. *See Louisiana State Bar Ass'n v. Haylon,* 250 La. 651, 198 So.2d 391, 392 (1967). Respondent's actions convincingly demonstrate that he does not possess the requisite moral fitness to practice law in this state. He must be permanently disbarred.[9]

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[9]Having determined that respondent must be permanently disbarred for his conduct in the Small matter, we need not address the appropriate sanction for the other counts of misconduct, although respondent's actions in these matters only reinforces our view that he lacks the moral fitness to practice law.

Accordingly, we will permanently disbar respondent from the practice of law in the State of Louisiana.

DECREE

Upon review of the findings and recommendations of the hearing committees and disciplinary board, and considering the record, it is ordered that the name of Donald O. Pinkston, Louisiana Bar Roll No. 17429, be stricken from the roll of attorneys and that his license to practice law in the State of Louisiana be revoked. Pursuant to Supreme Court Rule XIX, §24(A), it is further ordered that respondent be permanently prohibited from being readmitted to the practice of law in this state. All costs and expenses in the matter are assessed against respondent in accordance with Supreme Court Rule XIX, §10.1, with legal interest to commence thirty days from the date of finality of this court's judgment until paid.

APPENDIX E

EXCERPTS FROM RULE XIX OF THE LOUISIANA SUPREME COURT RULES RELATIVE TO LAWYER DISCIPLINE AS THEY EXISTED PRIOR TO AUGUST 1, 2001

Section 1. Authority of the Court.

Under the authority of Article V, Section 5(A) and (B) of the Louisiana Constitutionof 1974 and the inherent power of this court, it is ordered that Article XV of the Articles of Incorporation of the Louisiana State Bar Association be vacated and repealed, and the following Rules for Lawyer Disciplinary Enforcement be and are hereby adopted.

* * *

Section 10. Sanctions.

A. Types of Sanctions. Misconduct shall be grounds for one or more of the following sanctions:

(1) Disbarment by the court.

* * *

Section 24. Reinstatement and Readmission

A. Generally. A disbarred lawyer or a suspended lawyer who has served a suspension period of more than one year, exclusive of any waivers or periods of deferral, shall be reinstated or readmitted only upon order of the court. No lawyer may petition for reinstatement until six months before the period of suspension has expired. No lawyer may petition for readmission until five years after the effective date of disbarment. A

lawyer who has been placed on interim suspension and is then disbarred for the same misconduct that was the ground for the interim suspension may petition for readmission at the expiration of five years from the time of the effective date of the interim suspension.

* * *

APPENDIX F

EXCERPTS FROM RULE XIX OF THE LOUISIANA SUPREME COURT RULES RELATIVE TO LAWYER DISCIPLINE AFTER AUGUST 1, 2001 WITH COMMENTARY

* * *

Section 1. Authority of the Court.

Under the authority of Article V, Section 5(a) and (B) of the Louisiana Constitution of 1974 and the inherent power of this court, it is ordered that Article XV of the Articles of Incorporation of the Louisiana State Bar Association be vacated and repealed, and the following Rules for Lawyer Disciplinary Enforcement be and are hereby adopted.

* * *

Section 10. Sanctions.

A. Types of Sanctions. Misconduct shall be grounds for one or more of the following sanctions:

(1) Disbarment by the court. In any order or judgment of the court in which a lawyer is disbarred, the court retains the discretion to permanently disbar the lawyer and permanently prohibit any such lawyer from being readmitted to the practice of law.

* * *

Commentary of the Court to accompany Order dated July 19, 2001 amending Rule XIX

In the public interest, the Court has amended Louisiana Supreme Court Rule XIX to codify Permanent Disbarment as an available sanction for attorney misconduct. While the Court has always had the discretion to deny an application for readmission after the requisite five (5)-year waiting period after disbarment, an attorney who is permanently disbarred under these circumstances will be prohibited from applying for readmission to the bar. The amendments reflect the judgement of the Court that in some instances lawyer misconduct may be so egregious as to warrant a sanction of permanent disbarment based on the facts of an individual case and in consideration of the guidelines set forth in Appendix E to the Rules of Lawyer Disciplinary Enforcement. The amendments are substantially similar to the recommendations of the Office of Disciplinary Counsel and the House of Delegates of the Louisiana State Bar Association.

In adopting these amendments to Rule XIX, the Court has carefully considered the differences between the sanctions of disbarment and suspension, which differences are both substantive and significant. A suspended lawyer remains a lawyer during the period of suspension, retains a license to practice, but cannot practice law during the term of the suspension. However, one who has been disbarred loses his license to practice law. A suspension is imposed for a limited time, currently a maximum of three (3) years. An attorney who has been disbarred but not declared to be "permanently" disbarred under these amendments may apply for readmission after a period of five (5) years. The granting of readmission is within the sole discretion of the Court and is based upon the strict criteria enumerated in

Rule XIX, Section 24(E). Unless such readmission is petitioned for and is granted, a disbarment is effectively permanent.

The amendments we now adopt recognize that there are some types of misconduct that are so serious that where the sanction of disbarment is imposed, an application for readmission will not be considered.

KIMBALL, Justice, concurring in part and dissenting in part

I concur in part and dissent in part from this court's Order, dated July 19, 2001, which amends the Rules for Lawyer Disciplinary Enforcement to provide for permanent disbarment. Prior to this amendment, there was no provision in the Rules allowing this court to permanently disbar an attorney. Rather, a "disbarred" lawyer could petition the court for readmission to the practice of law after five years. The amendment retains this procedure, but allows the court, in its discretion, to effectively override this provision and impose "permanent disbarment," whereby attorney is permanently prohibited from being readmitted to the practice of law. While I commend the majority for initiating a type of disbarment that is permanent in nature, in my view, the Rules should not provide for different categories of disbarment.

Although the sanction of disbarment under the Rules has always provided that an attorney can be readmitted after five years, the term "disbarment" imparts a notion of permanency to the public and leads the public to believe that such sanction is permanently imposed. I believe that "disbarment" with the option for readmittance in five years is essentially a suspension and, there-

fore, misleads the public as to the ramifications of the sanction. The current rule still obfuscates the reality that attorneys who are "disbarred" will none-the-less be able to apply for readmission in five years. In my opinion, the public would be better served if this court were to increase the time an attorney guilty of misconduct may be suspended[1] and provide that all disbarments are permanent. I believe that suspension should be used in those cases where it is believed an attorney may be used in those cases where it is believed an attorney may be successfully rehabilitated and able to resume the practice of law, and I would reserve the sanction of disbarment, which by its very terms conveys an idea of permanency, for situations involving the most egregious misconduct.

* * *

Section 24. Reinstatement and Readmission.

A. Generally. A disbarred lawyer or a suspended lawyer who has served a suspension period of more than one year, exclusive of any waivers or periods of deferral, shall be reinstated or readmitted only upon order of the court. No lawyer may petition for reinstatement until six months before the period of suspension has expired. No lawyer may petition for readmission until five years after the effective date of disbarment. A lawyer who has been placed on interim suspension and is then disbarred for the same misconduct that was the ground for the interim suspension may petition for readmission at the expiration of five years from the time of the effective date of the interim sus-

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[1] Currently, the court may fix a period of suspension not in excess of three years as a sanction for misconduct. Supreme Court Rule XIX §10(A)(2).

pension. The court retains the discretion, in accordance with Section 10A of this rule, to permanently disbar a lawyer and permanently prohibit any such lawyer from being readmitted to the practice of law.

* * *

APPENDIX E. GUIDELINES DEPICTING CONDUCT WHICH MIGHT WARRANT PERMANETN DISBARMENT, SUGGESTED BY THE COMMITTEE TO STUDY PERMANENT DISBARMENT

The following guidelines illustrate the types of conduct which might warrant permanent disbarment. These guidelines are not intended to bind the Supreme Court of Louisiana in its decision making. It is hoped that these guidelines provide useful information to the public and to lawyers concerning the types of conduct the Court might consider to be worthy of permanent disbarment.

GUIDELINE 1. Repeated or multiple instances of intentional conversion of client funds with substantial harm.

GUIDELINE 2. Intentional corruption of the judicial process, including but not limited to bribery, perjury, and subornation of perjury.

GUIDELINE 3. An intentional homicide conviction.

GUIDELINE 4. Sexual misconduct which results in a felony criminal conviction, such as rape or child molestation.

GUIDELINE 5. Conviction of a felony involving physical coercion or substantial damage to person or property, including but not limited to armed robbery, arson, or kidnapping.

GUIDELINE 6. Insurance fraud, including but not limited to staged accidents or widespread runner-based solicitation.

GUIDELINE 7. Malfeasance in office which results in a felony conviction, and which involves fraud.

GUIDELINE 8. Following notice, engaging in the unauthorized practice of law subsequent to resigning from the Bar Association, or during the period of time in which the lawyer is suspended from the practice of law or disbarred.

GUIDELINE 9. Instances of serious attorney misconduct or conviction of a serious crime, when the misconduct or conviction is preceded by suspension or disbarment for prior instances of serious attorney misconduct or conviction of a serious crime. Serious crime is defined in Rule XIX, Section 19. Serious attorney misconduct is defined for purposes of these guidelines as any misconduct which results in a suspension of more than one year.

Approved by Supreme Court July 19, 2001, effective Aug. 1, 2001.

APPENDIX G

EXCERPTS FROM LETTER OF SEPTEMBER 10, 2003, TO DONALD O. PINKSTON FROM CHARLES B. PLATTSMIER, CHIEF OF DISCIPLINARY COUNSEL OF THE LOUISIANA ATTORNEY DISCIPLINARY BOARD ADVISING MR. PINKSTON THAT PURSUANT TO SUPREME COURT RULE 5.5(d) DISCIPLINARY ORDERS ISSUED AFTER JULY 1, 2002 PROHIBITED EMPLOYMENT OF DISBARRED LAWYERS.

[Filed SEP 23 2003]

[SEAL]

LOUISIANA ATTORNEY DISCIPLINARY BOARD
Office Of The Disciplinary Counsel
4000 S. Sherwood Forest Blvd.
Suite 607
Baton Route, Louisiana 70816
(225) 293-3900 • 1-800-326-8022 •
FAX (225) 293-3300

September 10, 2003

CERTIFIED MAIL: RETURN RECEIPT REQUESTED: 7196 9979 7490 0005 1689

Mr. Donald O. Pinkston
Suite 712, 4948 Chief Menteur Highway
New Orleans, LA 70126-3730

RE: Section 26 Requirement

Dear Mr. Pinkston:

By order of the Louisiana Supreme Court dated September 5, 2003, in Disciplinary Proceeding No. 2002-B-3251 and 2002-B-3252, you were permanently disbarred.

* * *

As to discipline orders issued after July 1, 2002, the Supreme Court of Louisiana instituted Rule 5.5(d) which prohibits employment of disbarred attorneys, and requires registration for suspended attorneys.

* * *

Sincerely,

/s/ Charles B. Plattsmier
CHARLES B. PLATTSMIER
Chief Disciplinary Counsel

APPENDIX H

EXCERPT FROM LOUISIANA RULES OF PROFESSIONAL CONDUCT 5.5 EXISTING PRIOR TO JULY 1, 2002

Rule 5.5. Unauthorized practice of law.

A lawyer shall not:

(a) Practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction; or

(b) Assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

APPENDIX I

EXCERPT FROM LOUISIANA RULES OF PROFESSIONAL CONDUCT 5.5 EFFECTIVE JULY 1, 2002

Rule 5.5. Unauthorized practice of law.

A lawyer shall not:

* * *

(c) employ, contract with as a consultant, engage as an independent contractor, or otherwise join in any other capacity, in connection with the practice of law, any person the attorney knows or reasonably should know is a disbarred attorney, during the period of disbarment; or

* * *

2002 Amendment – Date Effective and Application

Part 1 of a Supreme Court Order dated April 4, 2002 amends Rule 5.5 of the Louisiana Rules of Professional Conduct. Part 2 of the Order provides:

"This rule shall become effective on July 1, 2002, and shall apply to all lawyers who are suspended or disbarred by any Order, Judgment, or Decree of the Court which becomes final after the effective date."